STATE OF MICHIGAN

COURT OF APPEALS

FRANCIS ARTHUR KOMARA and PAMELA ROSE KOMARA,

Plaintiffs-Appellants,

v

MERIDIAN MALL LIMITED PARTNERSHIP and ERMC II LP,

Non-Participating,

and

AIC, INC.,

Defendant-Appellee.

UNPUBLISHED
April 11, 2006

No. 258617
Ingham Circuit Court
LC No. 02-001429-CZ

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition in this action for breach of contract and negligence, which arises from injuries that Pamela Komara suffered when she slipped and fell on snow and ice in the parking lot of the Meridian Mall. Defendant contracted with the mall to remove snow from the parking lot. The trial court granted summary disposition in favor of defendant with regard to both the breach of contract and negligence claims. We affirm.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10)[1] tests the factual sufficiency of the complaint. *Corley v Detroit Bd of*

[1] While we note that the circuit court did not specify whether it was granting defendant's motion under MCR 2.116(C)(8) or (C)(10), this does not constitute error requiring reversal as argued by plaintiffs because this Court construes motions as having been decided under MCR 2.116(C)(10)
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Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. Review by this Court, however, is limited to the evidence that was presented to the trial court at the time that the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Plaintiffs contend that the trial court's grant of summary disposition was improper because there are genuine issues of material fact regarding whether Pamela Komara was an intended third-party beneficiary under the snow-removal contract between defendant and Meridian Mall and whether defendant's actions created a more hazardous condition, giving rise to a duty that was separate and distinct from defendant's contractual obligations.

With respect to their breach of contract claim, plaintiffs first argue that the trial court erred in dismissing their claim *sua sponte* because defendant did not request dismissal in its pleadings below. Defendant, however, did argue in its reply brief that plaintiffs could not maintain a third-party beneficiary claim. We, therefore, conclude that this argument lacks merit.

Next, plaintiffs assert that, under the language of the snow-removal contract, Pamela Komara was an intended third-party beneficiary and that the trial court erred in applying *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), to their third-party beneficiary claim. Although we conclude that the trial court did err in applying *Fultz* to their third-party beneficiary claim because its holding does not apply to third-party beneficiary claims, see *id.* at 463, the error does not require reversal by this Court because the trial court reached the right result, but for the wrong reason. *H A Smith Lumber & Hardware Co v Decina* (*On Remand*), 265 Mich App 380, 385; 695 NW2d 347 (2005), quoting *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) ("This Court 'will not reverse when the trial court reached the right result for the wrong reason.'"). Defendant was entitled to summary disposition because Pamela Komara was not an intended third-party beneficiary of the snow-removal contract.

A person is a third-party beneficiary of a contract when the contract establishes that a promise has been undertaken directly to or for that person. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). A third-party beneficiary may be a member of a class of persons if the class is sufficiently described. *Brunsell v Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002) (citation omitted). Further, "an objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary." *Id*. at 298 (citation omitted, emphasis added by *Brunsell*).

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when the trial court relies on evidence outside of the pleadings as it did in this case. *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997).

Plaintiffs rely on the following provision of the snow-removal contract to support their argument that Pamela Komara was a member of a sufficiently described class – mall patrons – and, therefore, she was an intended third-party beneficiary of the contract:

> 8. Standards of Performance. Contractor's performance of the services specified hereunder shall be in compliance with the highest standards recognized in the industry or trade to which the services relate. Contractor shall perform its obligations hereunder in a professional, timely and conscientious manner and in compliance with all applicable federal, state and local laws, ordinances and regulations. *Said services shall be performed at such hours and in such a manner as not to interfere with the operation of the above-described property, the transaction of business thereon, or access by persons entitled to enter thereupon*. Contractor's employees and personnel shall conduct themselves in the performance of their duties so as not to injure the reputation or prestige of the above-described property or the shopping center where the services are rendered or of any persons on such property. Contractor covenants that at no time during the existence of this Agreement will there by [sic] any labor strife of any kind which would interfere with the performance of the services hereunder or the access to or exit from such property during regular business hours either for the purpose of shopping or making deliveries or, in the opinion of the Owner's representatives at the premises, for any other purpose. [Emphasis added.]

Viewing the contract objectively, we conclude that defendant did not undertake to benefit mall patrons in the way that plaintiffs argue. Rather, it appears that this clause merely sets forth how defendant's services should be performed, and if it benefits anyone besides the mall, it would be the stores in the mall. Therefore, Pamela Komara was not an intended third-party beneficiary of the snow-removal contract, and the trial court properly dismissed plaintiffs' breach of contract claim.

Finally, plaintiffs argue that the trial court erred in dismissing their negligence claim against defendant. Plaintiffs first contend that, under *Fultz*, there was a genuine issue of material fact regarding whether defendant created a new hazard by allegedly packing snow on top of already existing ice; therefore, the issue should have been submitted to the jury and should not have been decided as a matter of law by the trial court. However, "[t]he threshold question in a negligence action is whether defendant owed a duty to the plaintiff." *Fultz, supra* at 463. "[T]here can be no tort liability unless defendant owed a duty to plaintiff." *Id*., citing *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). And whether a duty is owed to a plaintiff is a matter of law to be decided by the trial court, not a jury. See *id.*; *Phillips v Mirac, Inc*, 470 Mich 415, 426-427; 685 NW2d 174 (2004).

In *Fultz*, our Supreme Court held that to maintain a negligence suit based on a defendant's common-law duty to perform its contractual duties with reasonable care, this Court must first find that the "defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz, supra* at 467. If there is no independent duty to plaintiff, there can be no tort action based on the contract. *Id*. Further, in *Fultz*, the Supreme Court cited *Osman v Summer Green Lawn Care*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), as an example of a case where a third party alleged a duty that was

separate and distinct from the defendant's contractual obligations. The *Fultz* Court found that there was an independent duty in *Osman* because the defendant had created a new hazard by moving snow to an area (near the sidewalk, steps, and walkway) where it knew or should have known melting and refreezing would pose a dangerous and hazardous condition to individuals walking in the area. *Fultz*, *supra* at 469. Thus, if a defendant creates a new hazard, even in the course of performing a contract, a duty that is separate and distinct from defendant's contractual obligations is created.

Plaintiffs argue that this case is distinguishable from *Fultz* and analogous to *Osman* because defendant created a new hazard by "plowing snow from the parking lot and packing it down to form and/or placing it on existing patches of ice." We disagree.

The *Fultz* Court found that a separate and distinct duty was owed to the plaintiff in *Osman* based on the defendant's creation of a "new hazard." Here, defendant did not create a "new hazard" when it allegedly plowed the snow in the mall parking lot and packed it down to form ice or placed the snow on existing patches of ice. Unlike the defendant in *Osman*, defendant did not create a "new" hazard when it moved the snow to a different area. Rather, Pamela Komara fell on the same hazard that defendant contracted with the mall to remove. Therefore, the trial court did not err in finding that defendant owed no common-law duty to plaintiffs to perform its contractual duties with reasonable care, and its grant of summary disposition to defendant was proper.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot